

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

FILED
February 18, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

v.)

TRAVIS LOVE and)
JAMES LEE,)

Appellants.)

No. 03C01-9406-CR-00205

Greene County

Hon. James E. Beckner, Judge

(Certified Question of Law)

For Appellant Love:

William A. Zierer
124 W. Main Street
P.O. Box 1276
Morristown, TN 37816

For Appellant Lee:

William H. Bell
114 S. Main Street
Greeneville, TN 37743

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Sharon S. Selby
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

C. Berkeley Bell, Jr.
District Attorney General
and
Anthony E. Hagan
Assistant District Attorney General
113 West Church Street
Greeneville, TN 37743

OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The defendants, Travis Love and James Lee, were convicted upon guilty pleas in the Greene County Criminal Court of the offenses of possession with the intent to sell more than one-half gram of cocaine, a Class B felony, and simple possession of marijuana, a Class A misdemeanor. Lee also pled guilty and was convicted of possessing less than one-half gram of cocaine with the intent to sell or deliver it, a Class C felony. Each of the defendants received an eight-year sentence for the Class B cocaine conviction and a sentence of eleven months and twenty-nine days for the marijuana conviction. In addition, Lee received a four-year sentence for possessing less than one-half a gram of cocaine. All sentences are to be served concurrently. The defendants appeal as of right upon a certified question of law that is dispositive of this case.¹ See T.R.A.P. 3(b); Tenn. R. Crim. P. 37(b). They contend that the trial court erred in refusing to suppress the contraband found as the result of a stop and search of the car they occupied. The trial court found that the stop and search of the car did not violate the defendants' Fourth Amendment rights both because neither defendant had a reasonable expectation of privacy in the car and because the search and seizure was supported by probable cause and exigent circumstances. The state contends that the appeal does not present a properly certified question of law and that, in any event, the trial court's findings were correct. We affirm the judgments of conviction.

The facts of this case are undisputed. On May 24, 1993, defendant Lee was arrested for possessing cocaine after he exited the Charray Inn in Greeneville, Tennessee, with cocaine. As a result of that arrest, Steve Burns of the Third Judicial

¹ Lee also entered a guilty plea to possession of more than one-half gram of cocaine in case number 11490 from the Greene County Criminal Court. Lee contends that this case is also before our court upon a certified question of law. His "Order Certifying Question of Law" indicates that he reserved a question relative to the propriety of the search leading to his arrest in case number 11490. However, case number 11490 arose out of events that occurred on May 24, 1993, and no evidence was presented at the suppression hearing relative to that case. Therefore the defendant waived any challenges to his conviction in case number 11490 by his guilty plea. T.R.A.P. 3(b); Tenn. R. Crim. P. 37(b)(2)(iii).

Drug Task Force received information from a citizen that Rodney Smith was staying at the Charray Inn in Greeneville, Tennessee. The citizen told Officer Burns that Smith was driving a tan Mitsubishi automobile with Georgia license plates and that he had noticed a lot of traffic to and from the motel. He also informed Officer Burns that Smith would not be staying at the Charray Inn after the 25th of May because there were no more reservations available after that date.

Officer Burns received more information regarding Rodney Smith from a confidential informant who had bought cocaine from Rodney Smith around May 24th. The confidential informant described Rodney Smith as his supplier and told Officer Burns that Rodney Smith was in possession of cocaine and was transporting cocaine from Atlanta to Greeneville in the Mitsubishi.

Based upon this information, Officer Burns drove to various Greeneville motels on May 26th in search of Rodney Smith's car. He found the car at the Holiday Inn in Greeneville and began surveillance. At one point, a vehicle with two women in it pulled into the parking lot next to the Smith vehicle. The passenger got out of her car, walked up to the Smith vehicle and looked inside a window that was halfway open. The passenger returned to her car and the women drove away. Several minutes later, Officer Burns saw Love pull into the parking lot driving a blue Nissan Maxima. Love parked the car and went inside the motel. After a few minutes, Love came out accompanied by another male, later identified as Henry Cheese. The two men walked to the Smith vehicle, looked inside and then got into the Maxima and drove away.

Officer Burns called on other surveillance to follow Love's vehicle. Love drove to an apartment complex in Johnson City where he parked next to a gold Cadillac. Officer Burns identified the gold Cadillac as belonging to Lee. Love and Cheese went into an apartment and, a few minutes later, returned to the Maxima

accompanied by Lee. The three men left the apartment complex, but stopped on their way out to pick up a fourth male who was carrying a cooler.

The four men drove back to the Greeneville Holiday Inn and went inside. A few minutes later they exited the motel. Love and Lee drove away in the Maxima and Cheese and the fourth male followed in Smith's Mitsubishi. Officers followed the cars for a few minutes and then stopped both vehicles. A search of the Maxima uncovered crack cocaine from underneath the passenger side floor mat and a "very small amount" of marijuana. Crack cocaine was also found in Lee's sock upon his arrival at the jail.

On cross-examination, Officer Burns admitted that Rodney Smith was not well known as a drug dealer in Greeneville. He stated that he relied upon the citizen informant's statements surrounding the suspicious activity of traffic coming to and from the motel based upon his knowledge of the citizen for a number of years and the fact that the citizen had nothing to gain from giving the information. He stated that he had found the confidential informant to be reliable in the past on the basis of a "couple of prior drug tips" but could offer no specifics regarding the reliability of the information. He admitted that neither of the informants had mentioned that Love was involved with Smith nor did he have any information that drugs were actually being kept inside the Smith vehicle.

The trial court denied both the defendants' motions to suppress because it found that neither defendant had "standing" to challenge the search. At Love's suppression hearing, the court also found that there were exigent circumstances and that probable cause was established from the observed activity, the informants' tips and the fact that Lee, a known drug arrestee, was in Love's company. The trial court attached the transcript of Love's suppression hearing as an exhibit to its ruling that Lee's motion to suppress be denied.

Preliminarily, the state contends that the defendants have failed to comply with the prerequisites for appellate review of a certified, dispositive question of law. The state argues that Love's question does not clearly identify the scope and limits of the legal issue that is reserved, does not contain the reasons relied upon by the defendant in the trial court or the court's rulings, and does not contain a specific indication that the trial judge and district attorney considered the question dispositive of the case. With respect to Lee's question, the state argues that it is unclear whether Lee relied upon the contentions cited in his question in the trial court, that the question does not contain the trial court's rulings, and that there is no explicit indication that the question reserved is dispositive of the case.

The record reflects that Love's motion to suppress was heard and denied on January 7, 1994, and that Lee's motion to suppress was heard and denied on January 21, 1994. Both defendants entered guilty pleas on January 24, 1994. The technical record contains orders certifying the question of law relative to each defendant. Lee's order was entered on the same day the defendants entered their guilty pleas, and Love's order was entered a week later. In their certified questions, both defendants allege that there was no probable cause to justify the stop and search of the vehicle.

In pertinent part, Rule 37(b), Tenn. R. Crim. P., provides for an appeal in a criminal case under the following circumstances:

- (2) Upon a plea of guilty or nolo contendere if:
 - (i) defendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the State and of the court the right to appeal a certified question of law that is dispositive of the case; or

.....

(iv) defendant explicitly reserved with the consent of the court the right to appeal a certified question of law that is dispositive of the case.

The Advisory Commission Comments state that the "first provision permits a plea bargain and an appeal in the context of a controlling question that needs answering, such as . . . the validity of the search upon which the State's case must be made, and should avoid the necessity for many trials." Rule 3(b), T.R.A.P., provides that an appeal as of right by a defendant lies from a judgment of conviction upon a guilty plea "if the defendant entered into a plea agreement but explicitly reserved with the consent of the state and the trial court the right to appeal a certified question of law dispositive of the action"

Our supreme court addressed the proper procedure for reserving a certified question of law in State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988). The court stated:

Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by the defendant for appellate review and the question of law must be so stated as to clearly identify the scope and the limits of the legal issue reserved. For example, where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law and review by the appellate courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Without an explicit statement of the certified question, neither the defendant, the State nor the trial judge can make a meaningful determination of whether the issue sought to be reviewed is dispositive of the case. Most of the reported and unreported cases seeking the limited appellate review pursuant to Tenn. R. Crim. P. 37 have been dismissed because the certified question was not dispositive. Also, the order must state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. Of course, the burden is on defendant to see that these prerequisites are in the final order and that the record brought to the appellate courts

contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. No issue beyond the scope of the certified question will be considered.

Relative to Love's certification of a dispositive question of law, the plea submission transcript reflects that Love explicitly reserved the right to appeal a certified question in connection with the entry of his guilty pleas. Although the judgments bear no indication that a certified question was reserved for appeal, the trial court entered its order certifying the question of law seven days after it entered the judgment, before the expiration of its jurisdiction. The fact that the order was entered subsequent to the judgment does not alter what was actually shown to have occurred in the proceedings. Love's certification order states as follows:

On January 24, 1994 the Defendant, Trevis [sic] Love, entered an unconditional guilty plea to the two indictments against him in Criminal Action No. 11351, pursuant to a Plea Agreement under Rule 11(e), Rules of Criminal Procedure, but he explicitly reserved with the consent of the State and of the Court the right to appeal a certified question of law that is dispositive of the case, to wit: whether the Court erred in denying Defendant's Motion to Suppress the only evidence against him in this Criminal Action, being .7 grams of cocaine base (crack cocaine) and .8 grams of marijuana, for the reason there was not probable cause to justify the stop and search of the motor vehicle operated by the Defendant as required by the United States Constitution and the Constitution of the State of Tennessee.

Unquestionably, the order could have and should have been more detailed. However, we do not view it to be so deficient as to require a dismissal of Love's appeal. The order states the general claim by the defendant relative to the absence of probable cause for the stop and search of the vehicle and that the right to appeal a certified question of law that is dispositive of the case was explicitly reserved with the consent of the state and trial court. Love's order is sufficient.

With respect to Lee's certified question, we note that at the conclusion of Lee's guilty plea submission hearing, his counsel asked the court whether he needed to

argue the suppression issue again. The trial court replied that it would sign an order allowing the issue to be addressed. Although the judgment against Lee makes no reference to the reservation of a certified question, the trial court filed the order certifying the question of law on the same day it accepted Lee's plea and entered the judgments against him. The judgment documents should make reference to and incorporate the separate order. However, failure to do so in this case is not fatal. As in Love's order, Lee's order makes the general claim that there was insufficient probable cause to stop and search the vehicle and that the information acted upon by the officers was given by an unreliable confidential informant. The order states that the motion to suppress was overruled. It further states that the issue was explicitly reserved with the consent of the state and the trial court as an issue that is dispositive of the case. We conclude that Lee's order is sufficient.

II

The trial court concluded that neither of the defendants had "standing" to challenge the search of the car. We agree that Lee's Fourth Amendment rights were not violated because he did not have a reasonable expectation of privacy in the car. See Griffin v. State, 604 S.W.2d 40, 43 (Tenn. 1980); State v. Burton, 751 S.W.2d 440, 446 (Tenn. Crim. App. 1988). However, we disagree with the trial court's conclusion that Love lacked a reasonable expectation of privacy in the car.

Officer Burns testified that although he knew the Maxima was owned by Love's brother-in-law, he also knew that Love had possession of the car most of the time and was freely allowed to drive it. Based upon these facts, Love had a sufficient expectation of privacy in the car to challenge the search. See State v. Morelock, 851 S.W.2d 838, 840 (Tenn. Crim. App. 1992).

III

Love contends that the evidence in this case was obtained as a result of an illegal stop and search of the Maxima, based upon insufficient probable cause. The state contends that there was sufficient probable cause to justify the stop and search of the car. The trial court held that there were exigent circumstances present to support a warrantless search and seizure and that probable cause was established by the information given to Officer Burns by the informants, the independent corroboration obtained through surveillance and the fact that Lee, a known drug arrestee, was in Love's company. A trial court's findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23; State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990).

The analysis of any warrantless search must begin with the proposition that such searches are per se unreasonable under the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution. This principle against warrantless searches is subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); State v. Tyler, 598 S.W.2d 798, 801 (Tenn. Crim. App. 1980). Before the fruits of a warrantless search are admissible as evidence, the state must establish by a preponderance of the evidence that the search falls into one of the narrowly drawn exceptions to the warrant requirement. State v. Shaw, 603 S.W.2d 741, 742 (Tenn. Crim. App. 1980).

There are exceptions to the warrant requirement which provide for warrantless searches of automobiles. For instance, the warrantless search of an automobile is allowed if an officer has probable cause to believe that the vehicle contains contraband and exigent circumstances require an immediate search. Carroll v. United States, 267 U.S. 132, 155-56, 45 S. Ct. 280, 286 (1925); State v. Leveye, 796 S.W.2d 948 (Tenn. 1990). Another exception to the warrant requirement occurs when

an officer searches the passenger compartment of an automobile incident to a lawful arrest. New York v. Belton, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864 (1981). To decide whether the search conducted in this case meets either of these exceptions, we must determine whether Officer Burns had either probable cause to believe that the car Love was driving contained contraband or probable cause to arrest either Love or Lee.

If the information upon which probable cause is based is not of the officers' personal knowledge, but is received from an informant, probable cause under our state constitution is determined by the application of the Aguilar-Spinelli two-pronged test. State v. Jacumin, 778 S.W.2d 430, 431 (Tenn. 1981). The test requires the state to establish a factual basis for the information provided and the veracity of those supplying the information. Id. The veracity prong may be satisfied by establishing an informant's inherent credibility or by establishing the reliability of the information. Spinelli v. United States, 393 U.S. 410, 415, 89 S. Ct. 584, 588 (1969); Aguilar v. Texas, 378 U.S. 108, 115, 84 S. Ct. 1509, 1514 (1964). However, any deficiency in the informant's information under this two-prong test may be overcome by independent police corroboration. Jacumin, 778 S.W.2d at 436.

In this case, Officer Burns stopped and searched defendant Love's car based, in part, on information he received from a confidential informant regarding Rodney Smith and the tan Mitsubishi. The informant told Officer Burns that Smith possessed cocaine and was operating the tan Mitsubishi. Officer Burns testified that the confidential informant described Rodney Smith as his supplier and had purchased drugs from him two days before the defendants' arrests. This information is sufficient to satisfy the basis of knowledge prong of Aguilar-Spinelli. State v. Moon, 841 S.W.2d 336, 339 (Tenn. Crim. App. 1992).

When Officer Burns was asked about the reliability or credibility of the informant, the following colloquy took place:

Q. On what basis do you have to weigh that credibility or reliability of that informant?

A. Information that I had received from this person that I had checked out and found to be credible.

Q. Such as? How many occasions?

A. Just on a couple of different things.

Q. Such as?

A. Drugs.

Q. Can you be more specific?

A. No.

Officer Burns also explained that he believed the informant because he received the information as the result of a charge that he placed against the informant and because the information he received from the informant concerned illegal activity in which the informant was involved. See United States v. Harris, 403 U.S. 573, 583-84, 91 S.Ct. 2075, 2081 (1971) (plurality opinion recognizing that informant's admission of a crime carried its own indicia of credibility); cf. State v. Moon, 841 S.W.2d at 340 (no indicia of credibility when information received from informant is unrelated to informant's criminal activity). The information was also corroborated by the citizen bystander informant who told Burns about heavy traffic in and out of the Charray Inn while Smith was staying there, and by Lee's possession of cocaine after he left the Charray Inn on May 24, 1993. We conclude that Officer Burns was justified in believing that the information given by the informant was reliable. Thus, the veracity prong was satisfied. See, e.g., State v. Ballard, 836 S.W.2d 560 (Tenn. 1992); State v. Marshall, 870 S.W.2d 532 (Tenn. Crim. App. 1993).

However, our inquiry does not end with our determination that the informant's tip met the two-prong Jacumin test. To determine whether there was

probable cause in this case, we must decide whether Officer Burns had reason to believe that the car Love was driving contained cocaine, thereby justifying either an automobile search for contraband or a search incident to arrest. In reaching its conclusion that probable cause existed, the trial court stressed that Love was accompanied by Lee at the time Officer Burns searched the car. We agree that Lee's presence in the car is significant.

Based on information he had received from the informant, Officer Burns had probable cause to believe that Rodney Smith was selling cocaine and had used the Mitsubishi to transport it. Officer Burns was justified in inferring that Lee was connected to Smith and his drug operations because he knew that, two days earlier, Lee was arrested for possessing cocaine after he had left a different motel where Smith was staying and because he had seen Love and Lee arrive and enter the Holiday Inn with the two men who eventually followed them in the Mitsubishi. Given these facts, we conclude that Officer Burns acted reasonably under the circumstances and that his search of the car Love was driving was supported by probable cause and exigent circumstances.

In consideration of the foregoing and the record as a whole, the judgments of conviction are affirmed.

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Judge

Robert E. Burch, Special Judge